

**PART I – INVITATION TO SUBMIT  
STATEMENTS OF EXPERTISE AND RESOURCES**

**A. PURPOSE**

The U.S. Department of Energy (“DOE”) seeks to develop a standing list of law firms (“Standing List”) in support of DOE’s issuance of loan guarantees under Title XVII of the Energy Policy Act of 2005, 22 U.S.C. 16511-16514 (“Title XVII”). The Standing List will include law firms that meet the review criteria set forth in Part III of this Invitation and are capable of providing to DOE the types of required services set forth below in Section C “Role of Project Transactional Counsel and Summary of Work Areas.” Law firms will be placed on the Standing List upon execution of an Instrument of Agreement and will become Legal Consultants.

DOE will retain the services of Legal Consultants as Project Transactional Counsel pursuant to a competitive Matching Order process with respect to specific projects. Project Sponsor(s) or Applicant(s) responding to DOE’s loan guarantee solicitations (collectively, the “Project Sponsors”) shall be solely responsible for payment of the fees and expenses incurred by Project Transactional Counsel.

**Neither this Invitation nor selection as a Legal Consultant confers any commitment or obligation from DOE. Under no circumstances does this Invitation seek to award a contract for services under the Federal Acquisition Regulation (“FAR”) or a financial assistance agreement under Part 600 of title 10 of the Code of Federal Regulations (“CFR”).**

**B. BACKGROUND OF LOAN GUARANTEE PROGRAM**

Pursuant to Title XVII and the implementing regulations set forth in 10 CFR Part 609 (“Final Regulations”), the Secretary of Energy is authorized to enter into loan guarantee agreements only in connection with projects that “avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases; and employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued.” A principal goal of Title XVII is to encourage the commercialization of such new or significantly improved technologies. A more complete description of DOE’s loan guarantee program is available at <http://www.lgprogram.energy.gov/index.html>. All law firms interested in responding to this Invitation (“Invitees”) are encouraged to review and become familiar with the requirements of Title XVII and the Final Regulations. Copies of Title XVII and the Final Regulations may be found at <http://www.lgprogram.energy.gov/keydocs.html>.

DOE issued its first solicitation under Title XVII in August 2006. In October 2007, DOE invited 16 Project Sponsors who submitted pre-applications in response to DOE’s first solicitation to submit complete applications for loan guarantees. These projects include new or significantly improved technologies involving the uses of biomass, fossil energy, solar, industrial energy efficiency, electricity delivery and energy reliability, hydrogen, and alternative fuel vehicles.

In June 2008, DOE issued additional solicitations for applications for loan guarantees for

projects involving renewable and/or energy efficient systems and manufacturing, distributed energy generation, transmission and distribution; nuclear power facilities; or front-end nuclear facilities. Later in 2008, DOE anticipates soliciting loan guarantee applications for advanced fossil energy projects, including coal-based power generation facilities, industrial gasification activities at retrofitted and new facilities that incorporate carbon capture and sequestration, and advanced coal gasification facilities.

DOE generally expects to review loan guarantee applications for projects structured on a limited recourse project financing basis. However, DOE has also encouraged the submission of loan guarantee applications supporting structures outside of the classical limited project finance approach that provide a reasonable assurance of repayment and meet other Title XVII objectives.

To facilitate timely action on applications for loan guarantees, and consistent with market practices particularly in project financings, DOE is seeking independent advisory services on a project-by-project basis in a number of areas of expertise, including financial, technical and engineering, legal, and marketing. Expertise will be required for all aspects of the loan guarantee process with respect to a given project, including preliminary technical and financial review, due diligence, underwriting, structuring, negotiation, disbursement and construction, and monitoring phases, as well as under circumstances beyond standard monitoring. This Invitation is limited, however, solely with respect to legal advisory services.

### **C. ROLE OF PROJECT TRANSACTIONAL COUNSEL AND SUMMARY OF WORK AREAS**

DOE will seek advisory services from Legal Consultants with senior level experience to serve as Project Transactional Counsel. Project Transactional Counsel, under the direction and supervision of DOE's Office of General Counsel, will advise DOE on various legal aspects of projects of potential interest to DOE, including, but not limited to, projects in the following energy or energy-related sectors:

- Renewable energy systems, particularly focusing on one (1) or more of the following technologies:
  1. biomass technologies
  2. geothermal technologies
  3. solar technologies
  4. wind and hydropower technologies
- Advanced fossil energy technology, including coal gasification meeting certain Title XVII requirements (e.g., emission levels)
- Hydrogen fuel cell technology (e.g., residential, industrial or transportation applications)
- Advanced nuclear energy facilities
- Carbon capture and sequestration practices and technologies (e.g., agricultural and forestry practice that store and sequester carbon)
- Efficient electrical generation, transmission, and distribution technologies
- Efficient end-use energy technologies
- Production facilities for fuel efficient vehicles (e.g., hybrid and advanced diesel vehicles)
- Pollution control equipment

- Refineries, meaning facilities at which crude oil is refined into gasoline

The Project Transactional Counsel will perform, or cause to be performed work, in the following areas on behalf of DOE or at the direction of DOE:

### **Work Area 1 Review of Loan Guarantee Application**

- Review and advise DOE on all documents related to the project and necessary to implement DOE actions in response to a given application (the “Transaction Documents”), including the Project Sponsor’s pre-application, application, project documents, debt financing or loan documents, loan guarantee agreement, security documents, legal opinions, any applicable funding documents, including in connection with the Federal Financing Bank, if applicable, third-party contracts and all other documents pertinent to the project, as well as all applicable statutes and regulations.
- Draft and deliver to DOE at the request of DOE memoranda describing any project documents reviewed; identifying any material issues identified therein; analyzing such issues; and, if appropriate, explaining how such issues were or could be addressed, mitigated or resolved.

### **Work Area 2 Legal Advisory Services/Due Diligence**

- Provide legal advice and assistance to DOE related to all aspects of underwriting, structuring, documenting, financing and implementation of complex financing transactions in the energy and energy-related industry sectors described above in Section C in this Part I.
- Provide legal advice and expertise in the following practice areas as may be needed from time to time: corporate; debt financings, particularly project finance; contracts; tax; bankruptcy and debt restructuring; secured transactions; inter-creditor arrangements; real estate; mortgage banking; energy law; environmental law; and intellectual property; and employment and labor.
- Analyze legal issues, including compliance with applicable statutory, regulatory, contractual and policy requirements in connection with DOE’s consideration and evaluation of a Project Sponsor’s pre-application or application and its impact on DOE’s financial and programmatic interests.
- Undertake due diligence review of the Project Sponsor and other key parties that is customary in areas including but not limited to any material agreements related to the project, corporate formation and governance documents, material litigation, regulatory approvals.
- Provide counsel, or cause counsel to be provided, on all matters of local law, local security documentation, or jurisdiction-specific legal issues such as local land use,

permitting, tax and real property laws and effectuate security interests contemplated; advise DOE and prepare documentation that may be required in connection with all local law matters, including tax matters arising out of the project.

- Consult promptly with DOE on all material, policy, legal and DOE-specific issues that may arise in the course of the project.
- Review Project Sponsor and third-party legal opinions and related correspondence, documents, pleadings, filings and other representations on issues arising from projects or proposed projects.
- Draft and deliver to DOE from time to time at the request of DOE and, in any event, prior to the financial closing date, “due diligence” memoranda, describing all project documents reviewed, identifying all material issues identified therein; analyzing such issues; and, if appropriate, explaining how such issues were or could be addressed, mitigated or resolved.

### **Work Area 3 Draft and Participate in Negotiations of Legal Documents**

- As requested and required by DOE, draft all applicable Transaction Documents for a project.
- As requested and required by DOE, participate and represent DOE in all aspects of project documentation and negotiations.

### **Work Area 4 Closing**

- Draft closing documents and certificates as required; prepare closing checklists; negotiate opinions of counsel to other project participants, which shall be delivered to DOE at closing; and assist DOE in the closing on the loan guarantee agreement.
- Draft and deliver to DOE prior to execution by DOE of its loan guarantee agreement and/or closing or disbursement (as may be appropriate in the context of the project) a closing opinion in form and substance satisfactory to DOE, regarding the satisfaction of conditions precedent to closing or disbursement, as the case may be.

### **Work Area 5 Post-Closing**

- Provide to DOE in electronic form all documents and closing certificates signed by DOE and other parties and all other relevant materials.
- Handle, under the supervision of DOE, all post-closing issues, including further disbursements, consents, amendments, waivers and drafting an “operational memorandum” for delivery to DOE post-closing that summarizes, among other items, the project and corporate structure, such as the collateral, and all principal Transaction Documents, identifying the parties, describing payment terms and dates,

outlining all reporting obligations to DOE; summarizes funding mechanisms; contains a time table as to disbursement/funding conditions, etc., as well as all other items required by DOE to assist it in loan monitoring and credit review.

- Provide DOE with counsel and representation on legal matters arising with respect to a project for so long as any loan guarantee issued to such project remains outstanding.

With respect to all of the foregoing work areas, Project Transactional Counsel shall provide DOE with oral and written analysis, advice and recommendations, including briefs, memoranda and letters to support opinions on issues analyzed and evaluated in the performance of work performed under a Matching Order.

## **D. DEFINITIONS**

**10 CFR 600** – The Department of Energy’s financial assistance rules, which do not apply to this Invitation.

**Applicant** – any person, firm, corporation, company, partnership, association, society, trust, joint venture, joint stock company, or other business entity or governmental non-Federal entity that has submitted an application to DOE and has the authority to enter into a loan guarantee agreement with DOE.

**Borrower** – any Applicant who enters into a loan guarantee agreement with DOE and issues guaranteed obligations.

**Covered Transaction** – A covered transaction is a nonprocurement or procurement transaction that is subject to the prohibitions of Title 2 of the Code of Federal Regulations Part 180. It may be a transaction at (a) the primary tier, between a Federal agency and a person; or (b) a lower tier, between a participant in a covered transaction and another person.

**FAR** – The Federal Acquisition Regulation, Title 48 of the Code of Federal Regulations; the FAR does not apply to this Invitation.

**Invitee** - All law firms interested in responding to this Invitation, individually or as a Team.

**Instrument of Agreement** – The written agreement between DOE and the law firms on the Standing List that contains (1) terms and conditions applying to future Matching Orders between the parties during its term; (2) a description of supplies or services that may be provided; and (3) methods for pricing, issuing, and delivering future Matching Orders. The Instrument of Agreement is not a contract, basic agreement, or basic ordering agreement under the FAR. Entry into an Instrument of Agreement does not guarantee that the Legal Consultant will receive a Matching Order.

**Legal Consultant** – An Invitee that has been determined to be capable of providing to DOE the services identified in this Invitation and that has signed an Instrument of Agreement. Legal Consultants will be eligible to compete to provide the services required under Matching Orders.

**Matching Order** – The written agreement used to place a binding legal relationship between a Project Transactional Counsel and DOE with respect to a particular project. The Matching Order

will not provide for payment by DOE for any Project Transactional Counsel's fees and expenses incurred in connection with the project. Prior to DOE's entering into a Matching Order, a potential Project Transactional Counsel and the Project Sponsor must execute a Sponsor Payment Letter.

**Principals** – A Principal means (a) an officer, director, owner, partner, or other person within an Invitee with management or supervisory responsibilities related to a future Matching Order; or (b) a consultant or other person, whether or not employed by the participant, who occupies a technical or professional position capable of substantially influencing the development or outcome of the performance of a Matching Order.

**Project Sponsor** – any person, firm, corporation, company, partnership, association, society, trust, joint venture, joint stock company or other business entity that assumes substantial responsibility for the development, financing, and structuring of a project eligible for a loan guarantee and, if not the Applicant, owns or controls, by itself and/or through individuals in common or affiliated business entities, a five percent or greater interest in the proposed eligible project or the Applicant.

**Project Transactional Counsel** – A Legal Consultant selected by DOE to provide legal advisory services to DOE under a Matching Order for a particular project.

**Sponsor Payment Letter** – A written agreement between the Project Transactional Counsel and the Project Sponsor and/or Borrower for payment of the services provided to, and expenses incurred on behalf of, DOE under a Matching Order.

**Standing List** – The standing list is comprised of those Invitees who have submitted Statements of Expertise and Resources in accordance with this Invitation and who have been determined by DOE to be capable of providing to DOE the services identified in this Invitation. Law firms will be placed on the Standing List upon execution of an Instrument of Agreement and will become Legal Consultants.

**Teaming Arrangements** – An arrangement in which two (2) or more law firms agree to work jointly and cooperatively as a potential Legal Consultant. The members of a Teaming Arrangement shall be referred to, individually, as a "Teaming Member" and, collectively, as a "Team."

**PART II –STATEMENT OF EXPERTISE AND RESOURCES**  
**SUBMISSION INFORMATION**

**A. CONTENT AND FORM OF STATEMENT OF EXPERTISE AND RESOURCES**

Invitees shall submit a Statement of Expertise and Resources, which shall consist of a written narrative detailing their capabilities to provide the services identified in Section C of Part I in this Invitation and providing the information requested below. Invitees may utilize Teaming Arrangements. If the Invitee is a Team, it may rely on the experience and capabilities of its Teaming Members in providing the information requested but, in doing so, shall clearly identify the respective Teaming Member possessing the experiences and capabilities described in its narrative.

1) Experience and Past Performance

(a) The Invitee shall describe its relevant experience and past performance by identifying completed projects where it performed duties and provided legal services comparable to the activities described in Section C of Part I in this Invitation. Only projects completed within the last five (5) years should be included. Examples of specific experiences in performing legal advisory services associated with financed projects, particularly on a project financing basis should be included. The Invitee shall provide the following information for each project:

- The name, address, and phone number and current contact information for professional references for each project and/or the entity requesting services for such project.
- Period of performance and place of performance.
- Total dollar value of project.
- Description of the Invitee's (1) scope of work; (2) work requirements; and (3) responsibilities and how these efforts are similar to the services required in Section C of Part I in this Invitation.
- Describe any experience in dealing with unique challenges that are/were associated with the project.

(b) Discuss Invitee's expertise and specialization in any particular industry or sector (e.g., power, renewable energy, infrastructure).

(c) Describe Invitee's experience with performing services in support of federal loan or loan guarantee programs, including any transactions utilizing the Federal Financing Bank or other similar governmental (e.g., multilateral or bilateral, U.S. or non-U.S.) business financing entities.

## 2) Resource Management

- (a) Describe Invitee's personnel resource capabilities, management capabilities and procedures used to staff projects. Further, describe the procedures used to acquire and allocate the personnel necessary to staff the task(s), retain qualified staff, and fill vacancies as they occur.
- (b) Invitee shall provide a description on how it will provide information technology ("IT") hardware, software, and secure facilities for non-government site performance.
- (c) Provide the names and resumes for key members of Invitee that would be expected to participate substantially under a Matching Order and a general description of the role to be performed by each member.

## 3) Additional Information

(a) Please identify the range of rates as they may vary by professional level and experience for the professionals identified in Section A.2)(c) of this Part II. Please describe the process Invitee would use to determine the total price or rates it would charge for its services rendered on a given project. Pricing will be an evaluation factor during the Matching Order process.

(b) Invitees must include the following statement certified by a duly authorized representative of the Invitee with its submission:

“By submission of this Statement of Expertise and Resources, I certify on behalf of Invitee that to the best of my knowledge and belief, that Invitee and its Principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from Covered Transactions by any Federal department or agency;

(b) Have not within a three (3) year period preceding the submission date of Invitee's Statement of Expertise and Resources been convicted of or had a civil judgment rendered against us for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery; falsification or destruction of records; making false statements; or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, local, or non-U.S.) with commission of any of the offenses listed in (b) above; and

(d) Have not within a three (3) year period preceding this application/proposal had one (1) or more public transactions (Federal, State or local) terminated for cause or default.”

Where the Invitee is unable to certify as to any of the statements in this certification,

such Invitee shall attach an explanation to its submission.

(c) If the Invitee is utilizing a Teaming Arrangement, please describe the rationale for such arrangement and effectiveness of the proposed Teaming Arrangements, such as the benefits of its use of subcontracting or joint venture arrangements. In addition, please describe the supervisory and reporting hierarchies and relationships among all Teaming Members, including joint ventures, partners, and subcontractors. If available, please include a copy of the teaming agreement.

## **B. SUBMISSION DUE DATE**

As applications for loan guarantees submitted in response to DOE loan guarantee solicitations are received and reviewed by DOE, DOE contemplates retaining Legal Consultants to serve as DOE's Project Transactional Counsel through a competitive Matching Order process, as described below in Part IV. The Matching Order process may begin as early as September 2008. Invitees are encouraged to submit their Statements of Expertise and Resources as soon as practicable to become Legal Consultants and participate in the Matching Order process.

Statements of Expertise and Resources should be submitted within one (1) year from the date of the issuance of this Invitation.

## **C. PROPRIETARY INFORMATION SUBMISSION**

Patentable ideas, trade secrets, proprietary or confidential commercial or financial information, disclosure of which may harm an Invitee, should be included in Invitee's Statement of Expertise and Resources only when such information is necessary to convey an understanding of the information required by Part II in this Invitation. The use and disclosure of such data may be restricted, provided the Invitee includes the following legend on the first page of the Statement of Expertise and Resources or electronic file submitted as part of a Statement of Expertise and Resources that contains such data and specifies the page numbers from such statement or electronic file that contains the proprietary data:

“The data contained in pages \_\_\_\_\_ of this Statement of Expertise and Resources have been submitted in confidence and contain trade secrets or proprietary information, and such data shall be used or disclosed only for evaluation purposes, provided that if this Invitee becomes a Legal Consultant and receives a Matching Order as a result of or in connection with the submission of this Statement of Expertise and Resources, DOE shall have the right to use or disclose the data herein, other than such data that have been properly reasserted as being trade secret or proprietary in the Matching Order. This restriction does not limit the U.S. Government's right to use or disclose data obtained without restriction from any source, including the Invitee.”

To protect such data, each line or paragraph on the pages of the Statement of Expertise and Resources or electronic file containing such data must be specifically identified and marked with a legend similar to the following:

“The following contains proprietary information that (name of Invitee) requests not be released to persons outside the U.S. Government, except for purposes of review and evaluation.”

#### **D. OTHER SUBMISSION AND REGISTRATION REQUIREMENTS**

1) Electronic Submission. Statements of Expertise and Resources must be submitted through the DOE Industry Interactive Procurement System (IIPS) at <http://e-center.doe.gov>. Instructions on how to submit a Statement of Expertise and Resources or an amendment to such Statement and how to register, submit questions, and view questions and answers are located on the web site at <http://e-center.doe.gov> (click on the Help button).

Prepare the Statement in accordance with the instructions in this Invitation prior to starting the transmission process. Submit the entire Statement of Expertise and Resources package in one (1) IIPS session (i.e., do not logoff before all the files are submitted).

When you are ready to submit your Statement of Expertise and Resources, go to <http://e-center.doe.gov> and complete the IIPS cover page. Enter “Legal Consultant Statement of Expertise and Resources – [insert law firm name]” in the “Subject” block. Then attach each file in the corresponding block in accordance with the IIPS guidance. Follow the instructions for submitting the Statement of Expertise and Resources.

If you have any problems accessing information or submitting your Statement of Expertise and Resources, contact the IIPS help desk at 1 800-683-0751 and select option 1, or send an email to [HelpDesk@pr.doe.gov](mailto:HelpDesk@pr.doe.gov).

#### **ONLY STATEMENTS OF EXPERTISE AND RESOURCES SUBMITTED THROUGH IIPS WILL BE CONSIDERED FOR PLACEMENT ON THE STANDING LIST.**

2) Electronic Signature. Statements of Expertise and Resources submitted through IIPS constitute submission of electronically signed applications. The name of the authorized organizational representative (i.e., the administrative official, who, on behalf of the submitting Invitee, is authorized to make certifications and assurances or to commit the Invitee to the conduct of the services performed in connection with a project) must be typed in the signature block on the form to be accepted as an electronic signature. Do not submit a scanned copy of the signed document.

3) IIPS Registration. In order to submit a Statement of Expertise and Resources, you must be authorized by the firm (i.e., institution or business entity) to submit a Statement of Expertise and Resources on its behalf and you must register in IIPS. You are encouraged to register as soon as possible. You only have to register once to apply for any DOE Invitation. To register go to <http://e-center.doe.gov> and follow the registration instructions.

## **E. MODIFICATIONS**

Notices of any modifications to this Invitation will be posted on the IIPS. You can receive an email when a modification or a message is posted by joining the mailing list for this Invitation through the link in IIPS.

## **F. QUESTIONS**

Questions regarding the content of this Invitation must be submitted through the “Submit Question” feature of IIPS at <http://e-center.doe.gov>. Locate the Invitation on IIPS and then click on the “Submit Question” button. Enter required information. You will receive an electronic notification that your question has been answered. DOE will try to respond to a question within three (3) business days, unless a similar question and answer have already been posted on the website. Questions relating to the registration process, system requirements, or the submittal process must be directed to the IIPS help desk at 1-800-683-0751 or [helpdesk@pr.doe.gov](mailto:helpdesk@pr.doe.gov).

## **G. COMMENTS**

DOE is accepting all Statements of Expertise and Resources submitted pursuant to this Invitation. Additionally, DOE is also accepting industry comments on the processes outlined in this Invitation until 5:30 pm Eastern Time on September 5, 2008. DOE reserves the right to make future modifications to the processes outlined in this Invitation.

## **H. AGENCY CONTACTS**

DOE Contracting Office Point of Contact:

Name:	Richard Bonnell
E-mail:	<a href="mailto:richard.bonnell@hq.doe.gov">richard.bonnell@hq.doe.gov</a>

For **comments** on the processes outlined in this Invitation:

[mailresponse@hq.doe.gov](mailto:mailresponse@hq.doe.gov)

## **PART III – STANDING LIST PLACEMENT INFORMATION**

### **A. STANDING LIST PLACEMENT**

DOE will notify Invitees selected for placement on the Standing List. This notice of selection is not an authorization to such Invitee to begin any work on behalf of DOE. Invitees not selected for placement on the Standing List will be advised as promptly as possible.

#### **This Invitation is solely for the purpose of developing a Standing List of Legal Consultants.**

This Invitation does not commit DOE to acquire or contract for any services or to pay any costs incurred in the submission of any Statements of Expertise and Resources or in making necessary studies or designs for the preparation thereof.

DOE and each Legal Consultant will sign an Instrument of Agreement as an instrument of understanding that contains terms and conditions applying to future Matching Orders issued by DOE on a project-by-project basis to retain the services of a Legal Consultant as the Project Transactional Counsel. Issuance of an Instrument of Agreement does not obligate DOE to issue a Matching Order to a Legal Consultant.

### **B. CRITERIA FOR STANDING LIST PLACEMENT**

This Invitation requires Invitees to demonstrate their ability to provide the advisory services identified in Section C of Part I in this Invitation to be placed on DOE's Standing List. At a minimum, each Invitee must demonstrate its expertise and resources to provide those services. If the Invitee is proposing a Teaming Arrangement, the following review criteria will be utilized to evaluate the information on the Teaming Members. All submissions will be reviewed on an acceptable/non-acceptable basis using the following review criteria:

#### 1) Experience and Past Performance:

- The Invitee will be evaluated on the extent and strength of its relevant experience and past performance in providing services similar to the tasks outlined in Section C of Part I to financing parties, including lenders and guarantors within the last five (5) years. In addition, the Invitee will be evaluated on the extent of specialized experience and past performance in the particular industry or sector (e.g., power, renewable energy, infrastructure). The Invitee will also be evaluated on the extent of experience with performing services in support of federal loan or loan guarantee programs, including any transactions utilizing the Federal Financing Bank or other similar governmental (e.g., multilateral or bilateral, U.S. or non-U.S.) business financing entities.

#### 2) Resource Management

- The Invitee will be evaluated on the extent and strength of its personnel resource capabilities, management capabilities and procedures used to staff projects as they are awarded. The Invitee's procedures used to acquire and allocate the personnel necessary to staff the task(s), retain qualified staff, and fill vacancies as they occur

will be evaluated for its ability to successfully support work under Matching Orders.

- The Invitee will be evaluated on its approach for providing IT hardware, software, and secure facilities for non-government site performance.
- The Invitee will be evaluated on the strengths and qualities of its key members that would be expected to participate substantially in a project.

### 3) Additional Information

(a) Pricing will not be reviewed on an acceptable/non-acceptable basis. The range of rates and the pricing method will be appraised to determine whether they are realistic and rational for the professional level and experience that will be necessary for services to be provided under a Matching Order. DOE will review the Invitee's proposed process used to develop its total price or rates it would charge for services rendered on a given project.

(b) The Excluded Parties List Systems ("EPLS") is the electronic version of the Lists of Parties Excluded from Federal Procurement and Nonprocurement Programs, which identifies those parties excluded throughout the U.S. Government (unless otherwise noted) from receiving Federal contracts or certain subcontracts and from certain types of Federal financial and nonfinancial assistance and benefits. DOE will review the EPLS prior to placing an Invitee on the Standing List.

(c) If a Teaming Arrangement is proposed, DOE will review the rationale for the Teaming Arrangement. DOE will also review the effectiveness of the proposed Teaming Arrangement.

## **C. CENTRAL CONTRACTOR REGISTRATION**

The Central Contractor Registration ("CCR") is the primary registrant database for the U.S. Federal Government. All Legal Consultants selected by DOE based on the criteria set forth in Section B above in this Part III will be required to register in the CCR database prior to executing an Instrument of Agreement. You may register at: <http://www.ccr.gov>.

## **D. EXPECTED NUMBER OF FIRMS TO BE SELECTED FOR THE STANDING LIST**

All law firms selected by DOE based on the criteria set forth in Section B above in this Part III, that execute an Instrument of Agreement will be placed on the Standing List and will become Legal Consultants.

## **E. DURATION OF STANDING LIST PLACEMENT**

All Legal Consultants shall remain on the Standing List until the earlier of (i) a Legal Consultant provides written notification to DOE requesting removal from the Standing List; (ii) DOE eliminates the Standing List; or (iii) a Legal Consultant fails to deliver upon request within 30

days by DOE a certification that the Legal Consultant continues to have the ability to provide, at a minimum, the legal services identified in the work areas in Section C of Part I of this Invitation.

**F. LIMITATION OF GOVERNMENT LIABILITY**

DOE's obligation under any Standing List is to use its best efforts to perform in accordance with the Instrument of Agreement. Under no circumstances shall DOE be liable to a Legal Consultant as a result of the conduct of a Project Sponsor, a Borrower, and/or any of DOE's contractors or subcontractors or for indirect, consequential, or special damages arising from such conduct, except as provided in the Instrument of Agreement; neither shall DOE be liable to a Legal Consultant for any damages due, in whole or in part, to causes beyond the control and without the fault or negligence of DOE, including but not restricted to, acts of God or public enemy, acts of the U.S. Government acting in its sovereign capacity, fires, floods, earthquakes, explosions, unusually severe weather, other catastrophes, or strikes.

## **PART IV – MATCHING ORDER PROCESS INFORMATION**

### **A. MATCHING ORDER PROCESS OVERVIEW**

As applications for loan guarantees submitted in response to DOE solicitations are received and reviewed by DOE, DOE contemplates retaining Legal Consultants to serve as DOE's Project Transactional Counsel advising in the work areas set forth in Section C of Part I in this Invitation on one (1) or more projects, as applicable. DOE will conduct a competitive process of matching a Legal Consultant as a Project Transactional Counsel (1) with a loan guarantee project or (2) for specific work areas set forth in Section C of Part I in this Invitation within a project.

The Contracting Officer will provide all Legal Consultants the opportunity to participate in each Matching Order process. The Contracting Officer or his/her designated representative shall submit a Request for Statements of Capability, Availability, and Price ("RSCAP") to all Legal Consultants on the Standing List. The RSCAP will outline the Matching Order process and contain a description of the specific services being requested for the Matching Order, submission instructions, and evaluation criteria. Legal Consultants submitting Statements of Capability, Availability, and Price ("SCAP") will also be required to submit a disclosure of conflicts of interest statement. The RSCAP may be issued via facsimile, electronic mail or any other means the Contracting Officer or his/her designated representative deems appropriate. The Contracting Officer may use streamlined procedures for the competitive Matching Order process, including oral presentations.

When making a Matching Order decision, factors including but not limited to the Legal Consultant's experience and capabilities, past performance, availability, staffing, and price may be considered in the selection decision. DOE will also conduct a conflicts of interest review based on the disclosure of conflicts of interest statement submitted by a Legal Consultant with respect to a Project Sponsor and/or Borrower.

In accordance with the competitive criteria specified in a RSCAP, DOE will select Project Transactional Counsel representing the **best value** to DOE to provide the needed services with respect to a project. A Matching Order will be issued to the Legal Consultant whose SCAP is the most advantageous to DOE while offering the **best value** considering price and non-price factors, as applicable. All Project Transactional Counsel will be required to execute conflicts of interest and nondisclosure acknowledgments.

### **B. ORGANIZATIONAL CONFLICTS OF INTEREST REVIEW PRIOR TO ISSUANCE OF MATCHING ORDER**

Each Legal Consultant responding to an RSCAP will be required to submit a disclosure of conflicts of interest statement along with its SCAP.

1) An organizational conflict of interest ("OCI") means that because of other activities and relationships with other persons, a person is unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might otherwise be impaired, or a person has an unfair competitive advantage.

It is not the intention of the DOE to prevent a Legal Consultant from participating in a competitive Matching Order process due to a perceived OCI. DOE Contracting Officers are fully empowered to evaluate each potential OCI scenario based upon the applicable facts and circumstances.

2) Potential organizational conflict of interest. The following examples illustrate situations in which questions concerning OCI may arise. They are not all inclusive.

(a) Unequal access to information. Access to “nonpublic information” as part of the performance of a Matching Order could provide a Project Transactional Counsel a competitive advantage in a later competition for another Matching Order or contract. Such an advantage could easily be perceived as unfair by a competing Legal Consultant who is not given similar access to the relevant information. If the requirements of the Matching Order anticipate the potential Project Transactional Counsel may have access to nonpublic information, the potential Project Transactional Counsel should be required to submit and negotiate an acceptable mitigation plan.

(b) Biased ground rules. In the course of performing a Matching Order, a Project Transactional Counsel has in some fashion established important “ground rules” for another Matching Order or contract, where the same Project Transactional Counsel may be a competitor. For example, a Project Transactional Counsel may have drafted the statement of work, specifications, or evaluation criteria of a future DOE procurement. DOE’s primary concern in this case is that a Project Transactional Counsel so situated could slant key aspects of a procurement in its own favor, to the unfair disadvantage of competing vendors. If the requirements of the Matching Order indicate the potential Project Transactional Counsel may be in a position to establish, or may have important ground rules, including but not limited to those described herein, the potential Project Transactional Counsel should be required to submit and negotiate an acceptable mitigation plan.

(c) Impaired objectivity. In the course of performing a Matching Order, a Project Transactional Counsel is placed in a situation of providing assessment and evaluation findings over itself, or another business division, or subsidiary of the same corporation, or other entity with which it has a significant financial relationship. DOE’s concern in this case is that the Project Transactional Counsel’s ability to render impartial advice to DOE could appear to be undermined by the Project Transactional Counsel’s financial or other business relationship to the entity whose work product is being assessed or evaluated. In these situations, a “walling off” of lines of communication may well be insufficient to remove the perception that the objectivity of the contractor has been tainted. If the requirements of the Matching Order indicate that the potential Project Transactional Counsel may be in a position to provide evaluations and assessments of itself or corporate siblings, or other entities with which it has a significant financial relationship, the affected Legal Consultant should provide a mitigation plan that includes recusal by the Legal Consultant from the affected Matching Order. Such recusal might include divestiture of the work to another third-party Legal Consultant.

3) Disclosure by Legal Consultants responding to an RSCAP:

(a) Legal Consultants should provide information which concisely describes all relevant facts concerning any past, present or currently planned interests (financial, contractual, organizational, or otherwise) relating to the work to be performed under a Matching Order and bearing on whether Legal Consultant has a possible OCI.

(b) If the Legal Consultant does not disclose any relevant facts concerning an OCI, the Legal Consultant, by submitting a SCAP or signing a Matching Order, warrants that to its best knowledge and belief no such facts exist relevant to possible OCI.

(c) A Project Transactional Counsel has a continuing obligation to disclose any circumstances that may create an actual or apparent conflict of interest. If a Project Transactional Counsel learns of such conflict, the Project Transactional Counsel is expected to report it immediately to the Contracting Officer and perform no more duties under the Matching Order until the Project Transactional Counsel receives instructions on the matter.

4) Remedies for Nondisclosure. The following are possible remedies if a Legal Consultant refuses to disclose, or misrepresents, any information regarding a potential OCI:

(a) Refusal to provide adequate information may result in disqualification for issuance of a Matching Order.

(b) Nondisclosure or misrepresentation of any relevant interest may also result in the disqualification of the Legal Consultant for issuance of a Matching Order.

(c) Termination of the Matching Order, if the nondisclosure or misrepresentation is discovered after a Matching Order has been issued.

(d) Disqualification from subsequent Matching Orders or contracts.

(e) Other remedial action as may be permitted or provided by all applicable laws or in the Matching Order.

### **C. SPONSOR PAYMENT LETTER**

Invitees are advised that, consistent with market practice in financings, fees and expenses incurred by a Project Transactional Counsel in connection with services it renders to DOE pursuant to a Matching Order shall be payable only by the Project Sponsor and/or the Borrower under all circumstances, without recourse to DOE by the Project Transactional Counsel, Project Sponsor, or Borrower. DOE will proceed with evaluating and processing a loan guarantee application only upon a Project Sponsor's entering into a Sponsor Payment Letter with a Project Transactional Counsel selected by DOE to provide services to DOE on the Project Sponsor's project. The Sponsor Payment Letter shall be executed by a Project Sponsor that demonstrates creditworthiness acceptable to the Project Transactional Counsel prior to any work being

performed by the Project Transactional Counsel. The Sponsor Payment Letter shall be subject to review and approval by DOE for the purposes of assuring that DOE is not in any way liable for the payment of any fees and expenses specified and for conformity with other applicable guidelines. In the event that a Project Sponsor fails to comply with the provision of such Sponsor Payment Letter, DOE may stop work on the Project Sponsor's application and/or reject the Project Sponsor's application.

DOE shall not be financially liable to the Project Transactional Counsel for any services rendered or expenses incurred in connection with a Matching Order pursuant to a Sponsor Payment Letter under any circumstances whatsoever, including whether a loan guarantee application is approved or a closing occurs or under circumstances in which the Project Sponsor or Borrower fails to pay such fees and expenses. The Sponsor Payment Letter shall require the Project Sponsor or Borrower to make periodic payments to the Project Transactional Counsel during the loan guarantee process, including prior to a financial closing (if any). Project Transactional Counsel shall submit to the Project Sponsor or Borrower periodic invoices for services rendered to DOE with respect to the Project Sponsor's project. Prior to submission of any invoice to the Project Sponsor or Borrower, Project Transactional Counsel shall have submitted the invoice to DOE for purposes of redacting any privileged attorney-client information. Project Sponsors and Borrowers shall acknowledge and pay all fees and expenses represented by such invoices upon their periodic presentation thereof, including prior to or at closing (if any).

Invitees are advised that notwithstanding the payment obligation of the Project Sponsor and/or Borrower with regard to the services rendered and expenses incurred by Project Transactional Counsel in connection with a Matching Order, the attorney-client relationship under a Matching Order is solely between DOE and the Project Transactional Counsel. Each Project Transactional Counsel shall specifically disclaim any inference of confidential, fiduciary or other client relationship between the Project Sponsor or Borrower of a given project and the Project Transactional Counsel, as a result of the Sponsor Payment Letter and shall not allow the Project Sponsor or Borrower to interfere with DOE's relationship with the Project Transactional Counsel, including DOE's ability, in its sole discretion, to terminate such Project Transactional Counsel.

#### **D. PERIOD OF PERFORMANCE**

The period of performance under each Matching Order will vary from project to project and will depend on the project. It is possible that a Matching Order could last for several years as loan guarantee applications are reviewed, loan guarantees are issued, and progress is monitored. DOE makes no representation as to the number of Matching Orders that may be available for competition.

#### **E. SPECIAL CONFLICTS OF INTEREST OBLIGATION UNDER MATCHING ORDER**

Prior to the issuance of a Matching Order, each Project Transactional Counsel will be required to execute a conflicts of interest and nondisclosure acknowledgement. This acknowledgement will contain a special conflicts of interest obligation such as the following:

Each Project Transactional Counsel to DOE on a project will provide in writing an agreement not to perform any work for any of the Project Sponsors and/or Borrower identified in the Matching Order, and any of its affiliates or corporate divisions, until the earlier of (a) approval of such work by the Contracting Officer or (b) two (2) years after (i) the completion of the work required by the Matching Order or (ii) the termination of a Matching Order.

For the term of the loan guarantee agreement for a given project, at no point shall Project Transactional Counsel undertake any representation that would preclude it from, or be in direct conflict with, representing DOE on such project.

The Project Transactional Counsel to DOE on a project providing service to DOE pursuant to a Matching Order shall not perform work on behalf of any party, other than DOE, in connection with any other project for which DOE may evaluate (including services in connection with an application or prospective application), has evaluated, or has issued a loan guarantee. However, the Project Transactional Counsel may work for such an entity and/or its affiliates if the Project Transactional Counsel's work for that entity and/or its affiliates is: (1) unrelated to the services provided under its existing Matching Order with DOE; (2) the Project Transactional Counsel obtains a waiver of conflicts from that entity and/or its affiliate; and (3) obtains written approval of the Contracting Officer prior to accepting such work.

## **F. RESTRICTIONS ON DISCLOSURE AND USE OF INFORMATION**

A Project Transactional Counsel may be required to access confidential or proprietary business, technical, or financial information belonging to the U.S. Government or other entities. Each Project Transactional Counsel shall execute a nondisclosure acknowledgment prior to issuance of any Matching Order that will contain a non-disclosure of confidential information obligation such as the following:

- 1) Under a Matching Order, a Project Transactional Counsel may be required to access confidential or proprietary business, technical, or financial information belonging to the U.S. Government or other entities. Such information shall be treated as confidential and the Project Transactional Counsel agrees not to appropriate such information to its own use or disclose such information to third parties unless specifically authorized by the Contracting Officer in writing. The foregoing obligations, however, shall not apply to:
  - (a) Information which, at the time of receipt, is in the public domain;
  - (b) Information which is published after receipt or otherwise becomes part of the public domain through no fault of the Project Transactional Counsel;
  - (c) Information which the Project Transactional Counsel can demonstrate was in its possession at the time of receipt thereof and was not acquired directly or indirectly from the U.S. Government or other entities;

(d) Information which the Project Transactional Counsel can demonstrate was received by it from a third party who did not require the Project Transactional Counsel to hold it in confidence.

2) The Project Transactional Counsel shall obtain the written agreement, in a form satisfactory to the Contracting Officer, of each of its employees or subcontractors permitted access, whereby the employee or subcontractor agrees that he will not discuss, divulge or disclose any such information or data to any person or entity except those persons within the Project Transactional Counsel's organization directly concerned with the applicable Matching Order.

3) The Project Transactional Counsel agrees, if requested by DOE, to sign an agreement identical, in all material respects, to the provisions of this clause, with each entity supplying information to the Project Transactional Counsel for purposes of an applicable Matching Order, and to supply a copy of such agreement to the Contracting Officer. From time to time upon request of the Contracting Officer, the Project Transactional Counsel shall supply DOE with reports itemizing information received as confidential or proprietary and setting forth the entity or entities from which the Project Transactional Counsel received such information.

4) The Project Transactional Counsel agrees that upon request by DOE it will execute a DOE-approved agreement with any party whose facilities or proprietary data it is given access to or is furnished, restricting use and disclosure of the data or the information obtained from the facilities. Upon request by DOE, such an agreement shall also be signed by the Project Transactional Counsel.

## **G. DATA RIGHTS**

Each Matching Order will contain specific work requirements and deliverables, subject to the rights in data obligations, such as the following:

### 1) Definitions

“Data” means recorded information regardless of form or the medium on which it may be recorded. The term includes technical data and computer software and information of a commercial or financial nature received from third parties. The term does not include information incidental to administration of a Matching Order, such as financial, administrative, cost or pricing or management information for the Matching Order.

“Unlimited Rights” means the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose whatsoever, and to have or permit others to do so.

“Proprietary Data” means data developed at private expense and that embody

trade secrets, or are commercial or financial and confidential or privileged.

2) DOE shall have:

- (a) Unlimited Rights in all Data delivered under a Matching Order, and in all Data first produced in the performance of a Matching Order, except as provided in paragraph 3) of this clause for copyright and except as provided with respect to Proprietary Data;
- (b) The right to limit exercise of claim to copyright in Data first produced in the performance of this Matching Order, and to obtain assignment of copyright in such Data, in accordance with subparagraph 3)(a) of this clause;
- (c) The right to limit the release and use of certain Data in accordance with paragraph 4) of this clause; and
- (d) The right to have all Data first produced or specifically used in the performance of a Matching Order delivered to DOE, either as the Contracting Officer may from time to time direct during the performance of the Matching Order or upon completion or termination of the Matching Order.

3) Copyright

(a) Data first produced in the performance of this Matching Order:

- (i) The Project Transactional Counsel agrees not to assert, establish, or authorize others to assert or establish, any claim to copyright subsisting in any Data first produced in the performance of a Matching Order.
- (ii) If DOE desires to obtain copyright in Data first produced in the performance of a Matching Order, the Contracting Officer may direct the Project Transactional Counsel to establish, or authorize the establishment of claim to copyright in such Data and to assign, or obtain the assignment of, such copyright to DOE or its designated assignee.

4) Release and Use Restrictions

Except as otherwise specifically provided for in a Matching Order, the Project Transactional Counsel shall not use for purposes other than the performance of a Matching Order, nor shall the Project Transactional Counsel release, reproduce, distribute, or publish any Data first produced or specifically used in the performance of the Matching Order, nor authorize others to do so, without written permission of the Contracting Officer.

5) Indemnity

The Project Transactional Counsel shall indemnify DOE and its officers, agents, and employees acting for DOE against any liability, including costs and expenses, incurred as the result of the violation of trade secrets, copyrights, or right of

privacy or publicity, arising out of the creation, delivery, publication, or use of any data furnished under this Matching Order; or any libelous or other unlawful matter contained in such Data.

#### 6) Right to Inspect

The Project Transactional Counsel agrees, except as may be otherwise specified in a Matching Order for specific Data items listed as not subject to this provision, that the Contracting Officer or an authorized representative may, up to three (3) years after acceptance of all items to be delivered under the Matching Order inspect at the Project Transactional Counsel's facility any Data used in the performance of the Matching Order and not delivered.

#### 7) Restrictive Markings

The Project Transactional Counsel agrees that to the extent it receives or is given access to Data necessary for the performance of a Matching Order and which contain restrictive markings, the Project Transactional Counsel shall treat the Data in accordance with such markings. It is recognized that the Project Transactional Counsel will be given access to Data by DOE that is considered to be confidential or proprietary by the provider. The Project Transactional Counsel will use its best efforts to identify in Data delivered to DOE, Data first produced by the Project Transactional Counsel that embodies and discloses such Data of a provider (e.g., a due diligence report on Borrower).

### **H. LIMITATION OF GOVERNMENT LIABILITY**

DOE's obligation under any Matching Order is to use its best efforts to perform in accordance with the terms and conditions of the Matching Order. Under no circumstances shall DOE be liable to a Project Transactional Counsel as a result of the conduct of a Project Sponsor, a Borrower, and/or any of DOE's contractors or subcontractors for indirect, consequential, or special damages arising from such conduct, except as provided by a Matching Order; neither shall DOE be liable to Project Transactional Counsel for any damages due in whole or in part to causes beyond the control and without the fault or negligence of DOE, including but not restricted to, acts of God or public enemy, acts of the U.S. Government acting in its sovereign capacity, fires, floods, earthquakes, explosions, unusually severe weather, other catastrophes, or strikes.

### **I. ORDER OF PRECEDENCE**

The Matching Orders will incorporate by reference the required and applicable terms and conditions agreed upon in the Instrument of Agreement. As applicable, additional terms and conditions may be added to the Matching Order. In the event that a conflict between a Matching Order and an Instrument of Agreement, the Instrument of Agreement shall control.

A Sponsor Payment Letter shall be executed by a Project Sponsor and/or Borrower of creditworthiness acceptable to the Project Transactional Counsel prior to any work being

performed by the Project Transactional Counsel under a Matching Order. The Sponsor Payment Letter will be subject to DOE's review and approval. In the event of any inconsistency between the terms of an Instrument of Agreement, the Matching Order, or the Sponsor Payment Letter, the inconsistency shall be resolved by giving precedence in the following order: (1) the Instrument of Agreement; (2) the Matching Order; and (3) the Sponsor Payment Letter.

#### **J. INDEMNIFICATION**

DOE is limited by the Anti-deficiency Act from undertaking to pay any amounts that are not specifically obligated. Accordingly, DOE may not provide open-ended indemnities or agreements to reimburse third-party costs to any person. A Project Transactional Counsel shall always exclude DOE as an indemnifying party.

#### **K. PROFESSIONAL RESPONSIBILITY**

The relationship established between DOE and a Project Transactional Counsel under a Matching Order shall be an attorney-client relationship pursuant to which DOE shall be entitled to all the benefits and protections afforded to a client under the professional rules and ethical obligations applicable to such Project Transactional Counsel (collectively, "Professional Rules"). Nothing in the Invitation, the Instrument of Agreement, Sponsor Payment Letter, or Matching Order shall reduce or modify any Professional Rule or shall constitute a waiver of any attorney-client privilege or of any conflict under any Professional Rule with respect to the representation of DOE under a Matching Order, except as expressly set forth therein.